

Appeal from a decision of the Deputy Director, Minerals Management Service, dismissing as untimely an appeal from an assessment of additional royalty for production from oil and gas leases. MMS-87-0300-O&G.

Reversed and remanded.

1. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties: Generally--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

APPEARANCES: K. Ray Campbell, Esq., Houston, Texas, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by Walter Van Norman, Jr., from a decision of the Deputy Director, Minerals Management Service (MMS), dated October 2, 1987, dismissing his appeal from an April 29, 1987, order of the Houston Regional Compliance Office, MMS. The basis for dismissing the appeal stated in the decision was that the notice of appeal filed August 19, 1987, was not filed within 30 days of appellant's receipt of the "invoice" or "Bill for Collection" issued by MMS. ^{1/} Hence, MMS held dismissal was required by the appeal regulations at 30 CFR 290.3(a).

^{1/} Subsequent to the filing of the notice of appeal to this Board, the MMS decision was amended Nov. 20, 1987, to reflect that the appeal was not filed within 30 days of appellant's receipt of the Apr. 29, 1987, royalty order. The reference to a "bill for collection" or "invoice" was expressly deleted in light of the fact the April 1987 order included no such bill or invoice.

An understanding of the issue of timeliness as it applies to this case requires some knowledge of the factual context of the MMS decisions which have been appealed. Review of the record discloses that appellant was issued a decision by the Houston Regional Compliance Office, MMS, dated March 19, 1987, requiring payment of additional royalties for three Federal oil and gas leases. The three leases were identified as: 048-220694-D (Ohio Federal), 048-316841-A (Carlson Federal), and 049-015520-A (Tresner Federal). The MMS decision noted that appellant had paid royalty on the basis of a percentage of the gross proceeds realized from the sale of natural gas liquids (NGL's) and the residue natural gas produced from the leases. The basis for the assessment of additional royalty was the conclusion of MMS that the gross proceeds were less than the value of the residue gas when added to one-third of the value of the NGL's. MMS held that pursuant to the regulations at 30 CFR 206.105 and .106 the lessee is required to pay royalty on the basis of the higher value.

It appears from the March 1987 MMS decision that the royalty valuation issue crystallized as a result of an audit by MMS of appellant's royalty payments on the subject leases and the terms of the November 29, 1982, agreement for sale of lease production. The audit resulted in a March 29, 1985, MMS issue letter to which appellant responded by letter dated April 2, 1985. The March 1987 MMS decision rejected appellant's contention that the only available market for the NGL's and residue gas produced from the leases was the plant operator's offer of 50 percent of the revenue. Rather, MMS concluded that:

[V]alue, for royalty purposes, is determined by comparing the gross proceeds received under the sales contract with value based upon 100% of the residue gas and a minimum of one-third of the value of NGL's extracted. The greater of the two values obtained becomes the value upon which to calculate Federal royalties.

(Mar. 19, 1987, Decision at 2). In addition to billing appellant for the sum of \$18,244.48 in additional royalty for December 1982 through August 1984 based on the revised valuation, the MMS decision further advised that the lessee would be "directed by separate order to calculate and pay the royalties due for September 1984 to the present."

The March 1987 decision was timely appealed on April 23, 1987, with the filing of a notice of appeal in the Houston MMS office. On appeal (docket No. MMS-87-0180-O&G) this decision was subsequently affirmed by the Director, MMS. Further appeal was made to this Board in a case docketed as IBLA 89-39. Before this case was reached for decision on the merits, counsel for MMS moved for remand of the case for further consideration in light of the Notice to Lessees Numbered 5 Gas Royalty Act, P.L. 100-234, 101 Stat. 1719 (1988), and the Board's decision in Kerr-McGee Corp., 106 IBLA 72 (1988). This motion was granted by order of the Board dated April 28, 1989.

Meanwhile, true to its word, the Houston MMS office issued a second decision dated April 29, 1987, less than a week after the filing of the appeal of the first decision. This decision was received by appellant on

May 6, 1987. The April decision further implemented the March royalty valuation decision. 2/ This second decision assessed additional royalty on the same three leases on the same legal basis, i.e., the gross proceeds were less than one-third of the value of the NGL's plus the value of the residue gas, and royalty was properly payable on the higher value. Only two factors distinguished the second decision from the first decision: the period covered by the assessment ran from September 1984 through the time of the decision and the amount of the additional liability was indeterminate as the lessee was required to calculate the additional royalty due himself. 3/

Subsequently, appellant tendered a check under protest together with its supporting calculations by letter dated August 17, 1987, and simultaneously filed a letter with the Director, MMS, requesting that this additional payment under protest be joined in the prior appeal. Thereafter, MMS dismissed appellant's appeal to the Director and the appeal was filed to this Board.

Appellant's statement of reasons for appeal from the Deputy Director's decision (filed prior to the "amendment" of that decision) points out that there was no invoice or billing attached to the April 29 order. Rather, that order directed appellant to make calculations of the amount of alleged royalty underpayment pursuant to the terms of the March 19 royalty valuation decision which had already been appealed by Van Norman. Appellant points out that the necessary calculations were completed August 6 and these calculations were submitted to MMS along with payment under protest on August 17. Appellant contends the appeal was filed within 30 days of calculation of the amount at issue and, further, asserts that the calculations and payment under protest were a "continuation" of the March decision which was already under appeal.

In response to appellant's statement of reasons, MMS asserts that the April royalty order constitutes a separate and distinct requirement for payment of royalty for a different time period than that covered by the March 1987 decision. MMS contends that the orders were distinct demands for payment and the appeal of the latter order was properly dismissed as untimely.

[1] Dismissal of the appeal as to the additional royalty paid under protest pursuant to the April 1987 decision requires a triumph of form over

2/ Contrary to the general rule at 43 CFR 4.21(a) providing that the effect of decisions is stayed pending appeal, compliance with royalty payment orders is not automatically stayed pending appeal. 30 CFR 243.2.

3/ No explanation appears in the record for the issuance of two separate royalty assessments within five weeks on the basis of the same valuation decision for the same leases covering adjoining periods of production. It may be surmised that the bifurcated assessment was prompted by the fact that a prior MMS audit calculated the additional royalty for the period covered by the audit while MMS elected to require appellant to calculate the additional royalty for the period after the audit.

substance which does not withstand reasoned analysis. The timely appeal of the March 1987 royalty valuation decision requiring calculation of royalties on the basis of one-third of the value of the NGL's plus the value of the residue gas (notwithstanding the actual market for lease production) was clearly an appeal of the intention announced in that decision to require payment of royalties on this basis from September 1984 to the present time as well as an appeal of the requirement to pay royalty on such basis from December 1982 through August 1984. In this regard, we disagree with the characterization in the separate opinion of the March 1987 decision as limited to the issue of royalty due on production from December 1982 through August 1984. This decision was, in essence, a royalty valuation decision determining the method to be used to value production for purposes of royalty computation subsequent to appellant's November 1982 sales agreement. The record indicates that this issue was developed as a result of the audit through an issue letter sent to appellant and a response which was rejected by MMS. The fact that MMS issued a separate implementing order in April 1987, after the appeal of the royalty valuation decision was filed, requiring the lessee to calculate additional royalties on this same basis and tender payment cannot obscure the fact that appellant has timely appealed the requirement to compute royalties on this basis for these specific leases from December 1982.

Although this Board has generally been reluctant to take any action which would preclude review of appeals on the merits, we have strictly upheld the rule requiring timely filing of a notice of appeal and dismissed untimely appeals in the past in recognition of the intent of the rule to establish a definite time when administrative proceedings regarding a claim are at an end in order to protect other parties to the proceedings and the public interest. Ilean Landis, 49 IBLA 59, 61-62 (1980); see Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978). Such a rationale cannot be invoked in the context of the present appeal. The decision to value production for royalty purposes on the basis of one-third of the value of NGL's plus the value of the residue gas rather than on lessee's gross proceeds on the sale of production was clearly put at issue by the MMS decision of March 1987 and lessee's appeal thereof.

There is no basis in fact for the specter of endless potential appeals envisioned by the separate opinion herein. The mechanics of the process of issuing decisions is controlled by MMS. Indeed, we have noted that an appeal does not bar further implementing orders by MMS pending resolution of the appeal. The issue here is whether a timely appeal of an MMS royalty valuation decision which by its terms applies to production over the period from December 1982 to the date of the decision should be held untimely as to production over part of the time period because MMS issued a later implementing order directing appellant to calculate the amount of the royalty at issue. Such a holding would require us to ignore the nature of Van Norman's appeal of the March 1987 royalty valuation decision. The appeal was from the valuation methodology on which the \$18,244.48 billing was based. This valuation methodology was also the predicate of the subsequent implementing order.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Director's decision is reversed and the case is remanded for further consideration together with No. MMS-87-180-O&G.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE HUGHES CONCURRING IN THE RESULT:

While I agree with the majority that this matter should be remanded to the Director, Minerals Management Service (MMS), with instructions to consider further the merits of the order to pay at issue, my reasons for doing so are substantially different from the majority's. In reversing the Director's decision declaring untimely the notice of appeal of Walter Van Norman, Jr., the majority condemns it as a "triumph of form over substance." However, this is an empty condemnation, for any dismissal of an appeal for a procedural defect amounts to such. Yet, it is well recognized at all levels of the administrative and judicial systems, including the Board of Land Appeals and MMS, that failing to comply with mandatory procedural time limits is an area where, for good reasons, requirements of form quite properly control. In my view, MMS properly dismissed the notice of appeal as untimely.

As the majority notes, the Director, MMS, dismissed the appeal of Walter Van Norman, Jr., from an April 29, 1987, order of the Regional Manager, Houston Regional Compliance Office, MMS, because it was not timely filed in accordance with 30 CFR 290.3(a) (1986). The April 1987 order to pay was the second in a series of two. In the first order, dated March 19, 1987, the Regional Manager required Van Norman to pay additional royalties in connection with the production of natural gas from three onshore oil and gas leases. The requirement to pay additional royalties was based on a recalculation of royalties due pursuant to 30 CFR 206.105(c) and .106 (1986), using the aggregate value of 100 percent of the residue gas and one-third of the liquid hydrocarbons derived from processing the natural gas produced from the leases, rather than the gross proceeds received from the sale of those products. The March 1987 order specified the amount (\$18,244.48) of additional royalty due for the period December 1982 through August 1984, expressly advised that it applied only to this period, and stated that a separate order would be issued to cover the additional period from August 1984 forward: "Since this order addresses only the referenced leases for the production months December 1982 through August 1984, Walter Van Norman will be directed by separate order to calculate and pay the royalties due for September 1984 to the present." (Emphasis supplied.) The March 1987 order properly indicated that it was subject to appeal to the Director, MMS.

On April 23, 1987, Van Norman timely appealed from the March 1987 order. Along with his appeal, he submitted payment of the additional royalties due, under protest. Significantly, Van Norman's notice of appeal refers only to the \$ 18,244.48 demanded for the period ending in August 1984 and did not refer to the statement that additional royalties would be demanded for the period from September 1984 forward. That appeal was docketed by the Director, MMS, as MMS-87-0180-O&G.

MMS' second order to pay, which is involved in this appeal, was issued on April 29, 1987. That order repeated its explanation of the proper method of valuing the natural gas produced from the lease and required Van Norman to calculate and pay additional royalties for the three leases for the period from September 1984 to "the present," that is, to April 1987. The

April 1987 order expressly provided that it was subject to the Director, MMS: "You have the right to appeal in accordance with the provisions of 30 CFR 290. Any appeal taken will be to the Director, MMS, and the notice of appeal must be filed within 30 days from the receipt of this directive." It is difficult to conceive how MMS could have been more direct about Van Norman's obligation to file a separate notice of appeal.

Van Norman received the April 1987 order on May 6, 1987, but took no immediate action either to comply with it or appeal it. It was not until August 19, 1987, more than 90 days after he received it, that Van Norman submitted a check to MMS in the amount of \$ 12,492.74, representing the additional royalties for the period September 1984 through April 1987, as calculated by him. Van Norman himself expressly acknowledged at that time that his payment was late. By letter dated August 17, 1987, sent to the Division of Appeals of the Director, MMS, Van Norman requested that both payments be considered as covered by the appeal in docket number MMS-87-0180-O&G. MMS treated this letter as a notice of appeal from the April 1987 order and docketed the appeal as MMS-87-0300-O&G.

However, by decision dated October 2, 1987, the Deputy Director, MMS, dismissed appeal MMS-87-0300-O&G because the notice of appeal had not been filed within 30 days of Van Norman's receipt of an "MMS invoice," as required by 30 CFR 290.3(a) (1986). 1/ Van Norman appealed to this Board.

Pursuant to 30 CFR 290.3(a) (1986), an appeal to the Director, MMS, "may be taken by filing a notice of appeal in the office of the official issuing the order or decision within 30 days from service of the order or decision." It is now well established that a decision by the Director dismissing an appeal to him because it was not filed within the 30-day time limit set by the regulation will be affirmed; the Board has strictly interpreted this requirement. Pennzoil Oil & Gas, Inc., 61 IBLA 308 (1982); Mesa Petroleum Co., 44 IBLA 165 (1979). 2/

In the present case, there is no question that appellant received the April 1987 order on May 6, 1987. Accordingly, he was required to file an appeal to the Director within 30 days thereafter, i.e., on or before June 5, 1987. There is nothing in the record which could arguably be construed as a notice of appeal from the April 1987 order filed within the 30-day appeal period. 3/ The earliest date of the filing of appellant's

1/ On Nov. 20, 1987, MMS amended its decision to correct this mischaracterization of the Regional Manager's April 1987 order as an "MMS invoice."

2/ The Board has also strictly enforced this rule in numerous unpublished orders, e.g., Chapman Energy, Inc., IBLA 89-277 (Apr. 27, 1989); Quintana Petroleum Corp., IBLA 89-227 (Apr. 3, 1989).

3/ A statement of reasons for appellant's appeal from the March 1987 order of the Regional Manager was filed with MMS on June 22, 1987. Even if that could also be construed as an appeal from the April 1987 order, which we do not conclude, it was clearly filed after the 30-day appeal period following service of the April 1987 order and, thus, cannot be regarded as a timely filed appeal.

appeal was August 19, 1987, when he submitted his check in payment of the additional royalties due for natural gas produced from the subject leases for the period September 1984 through April 1987. This appeal was clearly filed well after the 30-day appeal period provided for by 30 CFR 290.3(a) (1986).

The majority accepts appellant's argument that his appeal should be considered timely filed because the calculation and payment of additional royalties required by the April 1987 order were a continuation of the matter already under appeal to the Director. By so doing, it disregards the explicit statements in the order that they were discrete and separately appealable. It is true that, at the time the Regional Manager issued his April 1987 order, appellant had pending before the Director an appeal from the Regional Manager's March 1987 order, which essentially involved the same subject matter as the April 1987 order, viz., the valuation of natural gas produced from certain onshore oil and gas leases according to the aggregate value of the residue gas and liquid hydrocarbons derived from processing the natural gas. However, regardless of the fact that the pending appeal involved the same subject matter as the April 1987 order, it cannot be assumed that appellant intended also to appeal the April 1987 order. Rather, 30 CFR 290.3(a) (1986) is properly construed as requiring that a separate notice of appeal from the April 1987 order be filed. Van Norman was expressly so advised by the April 1987 order. That was not done within the time period provided for by 30 CFR 290.3(a) (1986).

The majority's holding might be justified if the record did not demonstrate a rational basis for issuing two separate (and, in my view, separately appealable) decisions. Otherwise, MMS might be seen as dividing up its enforcement orders in hopes that some might not be appealed. While the record is far from clear, it does divulge a rationale for bifurcating the enforcement order here.

It appears that the initial MMS audit leading up to the March 1987 demand letter covered only the period through August 1984. It seems only prudent to me that MMS would wish to scrutinize lease records for the time period following the audit before extending its ruling, if only to confirm that the lessee had not actually been in compliance. Evidently, it did so promptly, as it was able to issue its second demand letter promptly, within a month of its first demand letter. Ironically, if it had waited longer, in my view, there could be no doubt that a separate appeal would have been required.

The majority, in effect, accepts Van Norman's notice of appeal from the March 1987 demand letter as a timely appeal from MMS' announced intention to require payments for a future period, to-wit, the period from "September 1984 to the present." By so ruling, the majority disregards well-settled Board holdings that an individual cannot appeal from a decision which merely proposes to take adverse action, but must instead await issuance of the adverse decision. Phillips Petroleum Co., 109 IBLA 4 (1989); State of Alaska, 85 IBLA 170 (1985); Lone Star Steel Co., 77 IBLA 96 (1983).

I am persuaded by the Solicitor's comments that the majority's holding is out of step with proper interpretation of the MMS appeals regulations and past rules of practice before the Board:

The only reason there appears to be any question as to whether the appeal should be dismissed is that it involves the same leases and issues as the previous appeal, just a different time period. However, the similarities do not make the second order any less a separate order which must be appealed timely. For the IBLA to hold otherwise would compel MMS to put all orders for all time periods into a single order or be faced with the possibility that a payor could appeal subsequent MMS orders on that lease at any time it desired. Thus, there would be no finality to the administrative process.

(MMS Response to Order to Show Cause at 4). I fully agree with the Solicitor that following the majority's holding will lead to awkward rulings in the future. Would an appeal of MMS' application of a valuation methodology to one lease automatically apply to all other leases held by the appellant? Would it apply if MMS suggests that it will be looking into other leases to determine if they are in compliance? Would it apply only if the appellant says it applies? How long can the appellant wait before he asserts that it applies?

Despite these disagreements with the majority, I remain troubled by the fact that, as the appeal arose, Van Norman's objections as to the March 1987 order to pay were being redressed, but his objections to the April 1987 order to pay, issued for identical reasons, were not. Indeed, the Board issued an interim order requiring MMS to explain why the payment order under appeal here should not also be reconsidered. ^{4/} It declined to do so, electing to stand firmly on the doctrine of administrative finality as contemplated by us in Santa Fe Energy Co., 110 IBLA 209, 210 (1989) (MMS Response to Order to Show Cause at 5).

^{4/} On Mar. 6, 1989, MMS filed a request that we vacate the Director's decision affirming on its merits the March 1987 order to pay (Walter Van Norman, Jr., IBLA 89-39) and remand the matter to it for further consideration "in light of the Notice to Lessees Numbered 5 Gas Royalty Act (NTL-5 Act), [Pub. L. 100-234,] 101 Stat. 1719 [(1988)], and the Board's decision in Kerr-McGee Corp., 106 IBLA 72 (1988)." By order dated Apr. 28, 1989, we granted this motion. Thus, MMS has plainly indicated that its March 1987 order to pay might be in error.

On July 10, 1989, appellant also requested the Board to set aside the decision at issue in this appeal (that is, the Deputy Director's October 1987 decision) and remand the case to MMS "for the same reasons" which animated the Board's Apr. 28, 1989 order. On Oct. 10, 1989, we issued an order to MMS to show cause why its April 1987 order to pay ought not also be re-examined. As noted below, MMS opposed this suggestion, arguing that administrative finality prevented it from being reconsidered.

However, we have recognized that the doctrine of administrative finality is not absolute, but is subject to the exception that a decision that has become final may be re-examined to correct or reverse an erroneous decision upon a showing of compelling legal or equitable reasons such as violations of basic rights or the need to prevent an injustice. Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 121 (1988); Village of South Naknek, 85 IBLA 74 (1985); Ida Mae Rose, 73 IBLA 97 (1983); and cases cited; see Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir. 1963). In my view, although MMS' April 1987 order to pay was not timely appealed and, therefore, clearly did become final, it should nevertheless be re-examined, as it is impossible to justify disparate treatment for the March and April 1987 orders to pay. If the March 1987 order is erroneous and is corrected, then the April 1987 order is also erroneous, and it would work an injustice not to require MMS also to address and correct the April 1987 order.

Thus, while I differ with the majority on all of the grounds announced in its decision, I support the result it reaches insofar as it remands the matter to MMS for further consideration of the merits of the April 1987 order to pay, in light of the NTL-5 Act, supra, and the Board's decision in Kerr-McGee Corp., supra. Accordingly, I concur in the result.

David L. Hughes
Administrative Judge

